NO. 89-481

IN THE SUPREME COURT
OF THE UNITED STATES

RECEIVED
DEC
SUPREME

OCTOBER TERM, 1989

PEOPLE OF THE STATE OF MICHIGAN

PETITIONERS,

VS.

THAIR HANNA SESI,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, THAIR HANNA SESI, hereby moves the Court to allow him to proceed in forma pauperis. His affidavit in support of this motion is attached hereto and marked as Exhibit A. He has not proceeded in forma pauperis in the Circuit Court for the County of Oakland, the Court of Appeals, and the Supreme Court for the State of Michigan.

Submitted by,

Thair H. Sesi, per se
33278 Linsdale Court
Sterling Heights, MI 48310

NO. 89-481

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

PEOPLE OF THE STATE OF MICHIGAN

PETITIONERS,

VS.

THAIR HANNA SESI,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

Thair H. Sesi, per se
33278 Linsdale Court
Sterling Heights, MI 48310
(313) 939-7432

NO. 89-481

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

PEOPLE OF THE STATE OF MICHIGAN

PETITIONERS,

VS.

THAIR HANNA SESI,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Thair Hanna Sesi, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Supreme Court's decision for the State of Michigan in this case. That opinion is reported at ____ Mich ____.

QUESTION PRESENTED

Does the Fourth Amendment bar a government agent, acting as a wife, from searching her husband's residence and a duffle bag used exclusively by him; then consent to a search of the residence to her fellow government agents?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS	1
ARGUMENT I:	6
I. WAS THE CIRCUIT COURT JUDGE AND THE COURT OF APPEALS CORRECT IN FINDING THAT SUSAN SESI WAS ACTING AS A POLICE AGENT WHEN SHE SEARCHED THE RESPONDENT'S HOUSE?	
ARGUMENT II:	9
II. WAS THE COURT OF APPEALS CORRECT IN SUPPRESSING THE EVIDENCE?	
CONCLUSION	14
AFFIDAVIT OF SERVICE	15
CERTIFICATE OF SERVICE	16

APPENDICES:

A. TRANSCRIPTS FROM HEARING HELD ON 4/20/88
B. TRANSCRIPTS FROM HEARING HELD ON 4/22/88
C. TRANSCRIPTS FROM HEARING HELD ON 4/25/88
D. CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES:	Page #
Alderman v. United States, 442 U.S. 165 (1968).....	9
Burdeau v. McDowell, 256 U.S. 465 (1921).....	9
Corngold v. United States, 367 F.2d, 1 (1966).....	6
Frazier v. Cupp, 394 U.S. 731 (1968).....	12
Gambino v. United States, 275 U.S. 310, (1972).....	6
Gould v. United States, 255 U.S. 298, (1920).....	9
Katz v. United States, 389 U.S. 347, (1967).....	10
Lewis v. United States, 385 U.S. 206, (1966).....	10
Lo-Ji Sales Inc. v. New York, 442 U.S. 319, (1978).....	10
People v. Wagner, 114 McA 541 (1982).....	9
United States v. Clegg, 509 F.2d 605 (1975).....	7
United States v. Coleman, 628 F.2d 961 (1980).....	6
United States v. Krell, 338 F. Supp 1372 (1975).....	6
United States v. Matlock, 415 U.S. 164 (1974).....	11
United States v. Miller, 688 F.2d 652 (1982).....	6
United States v. Snowadski, 723 F.2d 1427 (1984).....	6
U.S. v. U.S. District Court,.....	10
United States v. White, 401 U.S. 745, (1970).....	10

STATEMENT OF THE CASE

On March 16, 1987, an Affidavit for a search warrant was submitted to the Honorable Robert Turner of the 43rd District Court, in the County of Oakland, Michigan. The Affidavit was signed by Dennis Corrigan of the Madison Heights Police Department.

Pursuant to the warrant, a search of the Respondent's home was conducted and a seizure of cocaine was made. As a result, the respondent was charged with possession of a controlled substance contrary to MCL 333.74 or (2)(a)(11), C. L. 1979.

On April 20th and 22nd, 1988, an evidentiary hearing was held before the Honorable John N. O'Brien, Oakland County Circuit Court. That at said hearing, the testimony of the witnesses, police officer, Dennis Corrigan and Susan Sesi established the following:

1) That for at least a year preceding the search and seizure of March 16, 1987, the respondent and his wife, Susan Sesi, had been having ongoing marital problems.

2) That as a result, divorce proceedings were commenced and Mrs. Sesi moved out of the marital residence for an undetermined but substantial period of time, and then moved back into the marital residence.

3) That the marital difficulties continued, and in October of 1986, (or about six (6) months prior to the search and seizure), Mrs. Sesi contacted N.E.T. (Narcotics Enforcement Team) Officer Dennis Corrigan of the Michigan State Police; alleging that her husband, Thair, was involved in the sale of cocaine.

4) That Officer Corrigan instructed Mrs. Sesi to monitor the respondent's activities and movements and report same on a bi-weekly basis.

5) That Mrs. Sesi did in fact maintain contact with Officer Corrigan on a regular basis for the purpose of assisting the police to arrest the respondent.

6) That unknown to the respondent at the end of December

1987, or the beginning of January 1988, Mrs. Sesi put down a deposit on another residence for herself to rent.

7) That on or about January 30, 1988, (just prior to Mrs. Sesi's planned move out date), Mr. and Mrs. Sesi had an argument regarding her absence from the home the previous night.

8) That as a result of said argument, Mr. Sesi requested Susan Sesi to vacate the premises.

9) That at that time, Mrs. Sesi did vacate the premises in the presence of the Madison Heights Police, who remained at the location for over two hours while she removed here belongings.

10) That said premises located at 27741 Dartmouth, Madison Heights, was rented, pursuant to a written lease, solely by the respondent, who paid the rent without any contribution by Mrs. Sesi.

11) That subsequently, the respondent changed the locks on said residence and Mrs. Sesi was not given, nor did she have keys to the house at any subsequent time.

12) That at no time prior to March 16, 1987, did the respondent consent to Susan Sesi entering into said residence and in fact, he had denied her request to do so on the evening of March 15, 1987, and her entry was accomplished by her putting her hand through a hole in a window of the back door.

13) That on March 16, 1987, Officer Corrigan obtained a search warrant signed by Judge Robert Turner of the 43rd District Court.

14) That the Officer's Affidavit indicated that Mrs. Sesi had entered the premises earlier that day merely to pick up her belongings and that he merely provided her with the presence of a marked patrol unit from the Madison Heights Police Department because she feared for her safety.

15) That the Affidavit indicated that Mrs. Sesi found cocaine while in the respondent's residence during a search for her own belongings.

16) That in fact testimony indicated that Mrs. Sesi was an informant of long standing.

17) That at the time of Mrs. Sesi's entry of the residence, Officer Corrigan and Susan Lubahm, also of N.E.T. were present, and at least five (5) other N.E.T. officers were stationed nearly (within a minute or two by car) for purposes of securing the residence.

18) That testimony further revealed that Susan Sesi was searched for cocaine prior to her entry into the residence (Trans. 4-20-88, p. 52, L.7-16). She also testified to the fact at a prior. The underlying divorce case had already been set for trial for March 19, 1987 (three days after the search), Mrs. Sesi had previously testified at her deposition, (Trans. 4-20-88, p. 42-43, L.25-11), that the police were not present because she feared for her safety, and that she discussed narcotics in a meeting with Officer Corrigan just prior to arriving at the home.

19) That the cocaine was found in a sealed duffel bag that Mrs. Sesi indicated was used exclusively by the respondent.

That based upon the testimony and evidence presented at the hearing, the Court did find that the respondent s separated wife entered his home for the purpose of conducting a warrantless search for drugs in her capacity as a police agent (Trans. 4-25-88, p. 29). It was also established that she has been working as an informant for the police for about six months (Trans. 4-25-88, p. 32) and that the reason for entry as stated by the police and Mrs. Sesi (that being to retrieve personal belongings), was a "thinly veiled" pretext used to carry out their true purpose of a search for drugs (Trans. 4-25-88, p. 29).

The Court then indicated, however, that because Mrs. Sesi was still married to the defendant and had once resided at that home, that she therefore had the unfettered authority to consent to both a search of the premises as well as any of Mr. Sesi's belongings found there (Trans. 4-25-88, p. 29).

It should be emphasized that Mrs. Sesi had not lived in the house since the end of January 1987 (Trans. 4-20-88, p. 31, L. 19), she had no keys to the premises, her entry was gained by putting her hand through a hole in a back door window, (Trans. 4-25-88, p. 27), the respondent had refused to consent to her entry on prior occasions, she had made arrangements to voluntarily live elsewhere approximately one month prior to her actual departure date (Trans. 4-25-88, p. 27), and she had no ownership or other interest in the home itself (Trans. 4-10-88, p. 32, L.1). Furthermore, it was indicated that she not only searched the respondent's home, but a sealed duffel bag she testified was his. The testimony given by the prosecution witnesses themselves gave a strong indication of the pretextual nature of Mrs. Sesi's initial entry into the respondent's home.

On appeal, the Court of Appeals, in a unanimous decision, agreed with the Trial Court in finding that Mrs. Sesi was in fact a police agent and further held that the search conducted was subject to the Fourth Amendment and was warrantless, lacked probable cause, lacked exigent circumstances, nor fell under any other exception to the warrant requirement, and was in fact, illegal. As a result the Court of Appeals ordered that the evidence illegally seized be suppressed.

ARGUMENT

I. WAS THE CIRCUIT COURT JUDGE AND THE COURT OF APPEALS CORRECT IN FINDING THAT SUSAN SESI WAS ACTING AS A POLICE AGENT WHEN SHE SEARCHED THE RESPONDENT'S HOUSE?

Initially, it should be noted that this analysis of Mrs. Sesi's agency status was made at the request of the Court of Appeals, as the respondent is in total agreement with the Trial Court's finding that Mrs. Sesi was, in fact, acting as a government agent at the time of the search.

In order to determine whether Mrs. Sesi was acting as a police agent at the time of her search of the respondent's residence, the Court should consider whether the government knew of and acquiesced in the intrusive conduct and whether the party performing the search intended to assist law enforcement efforts, United States v. Snowadski, 723 F2d 1427 (1984), citing with approval U.S. v. Miller, 688 F2d 652 (1982). See also Gambino v. U.S., 275 U.W. 310 (1972); Corngold v. U.S., 367 F2d1, (1966); U.W. v. Krell, 388 F. Supp 1372 (1975).

Other factors to consider are whether the police actions are divorced from the detection, investigation, or acquisition of evidence and whether the police instigated, encouraged or participated in the search, U.S. v. Coleman, 628, F2d 961 (1980).

When examining the facts of this case against the standards set forth by the Courts, it is apparent that not only was the Trial Court and the Court of Appeals not clearly erroneous, but the Courts were in fact absolutely correct. The testimony and evidence clearly revealed that Mrs. Sesi had been acting in concert with the government for a substantial period of time (a period of about six months) for the sole purpose of providing evidence against Mr. Sesi with respect to his alleged narcotics involvement. It was intended by all the parties that this evidence be used by the police to charge the respondent with some crime (Trans. 4-20-88, p. 35, L.4-8).

The police directed Mrs. Sesi to report to them on a bi-

weekly basis, which she did. The purpose of that ongoing communication was to effectuate the arrest of Mr. Sesi by the use of a traffic stop (Trans. 4-22-88, p. 33-48).

On March 16, 1987, a meeting was held between several narcotics officers and Mrs. Sesi. At that meeting, the possibility of finding narcotics was discussed (Trans. 4-20-88, p. 54, L.13). Just prior to entering the house, the informant was searched for narcotics (Trans. 4-20-88, p. 52, L.1-17), and accompanied up to the door of the house (same cite). As a matter of fact, Officer Corrigan drove to the respondent's house in Mrs. Sesi's car (Trans. 4-20-88, p. 14, L.1-14). Then Mrs. Sesi conducted a search of Mr. Sesi's house.

All in all, there is little, if any, doubt that the police knew of and acquiesced in, the intrusive conduct of Mrs. Sesi, that Mrs. Sesi intended to assist the police by conducting this search, and that the police actions stemmed from a desire to acquire evidence and constituted encouragement if not total participation in this search. In short, this case is an example of one in which agency is demonstrated not by just one factor cited by the Courts as important, but by virtually every factor other courts have cited as evidencing agency.

As the Court stated in U.S. v. Clegg, 509 F2d 605, p. 609; (1975):

> "It is only when the government has preknowledge of and yet acquiesces in a private party's conducting a search and seizure which the government itself, under the circumstances could not have undertaken that the problem discussed in U.S. v. Mekjian, 505 F2d 1320 (1975) arises. Preknowledge and acquiesces make a search by a private party a search by the government. Fourth Amendment standard must be complied with."

It is not even necessary (although it was established anyway) to demonstrate that the government participated in and encouraged the search itself. If the search by a private party was conducted solely for the purpose of aiding law enforcement,

the search is illegal.

In upholding amotion to suppress evidence, the Court in U.S. v. Krell, supra, stated:

> "And even if the government does not encourage the search, if an airline agent searched solely for the purpose of aiding in law enforcement, the search is illegal. Gambino, supra; Corngold, supra; U.S. v. Issad, 370 F Supp 1110 (1974)."

Additional evidence presented indicating the degree of collaboration between the police and Mrs. Sesi is discussed in other parts of the brief, but included the presence of several other N.E.T. officers in the immediate area for the purpose of securing the premises once narcotics were found, the possession of narcotics field testing equipment and the divorce trial being scheduled for March 19, 1987 (three days subsequent to the search), where a judge could have ordered the return of Mrs. Sesi's supposed property, which, by the way, she never bothered to recover.

ARGUMENT

II. WAS THE COURT OF APPEALS CORRECT IN SUPPRESSING THE EVIDENCE?

The warrantless search conducted in this case arises out of the ongoing domestic disputes between the defendant and his then separated wife (now ex-wife), Susan Sesi. Since only the prosecution's witnesses testified (i.e., Susan Sesi and Officer Dennis Corrigan), the facts that form the basis for the respondent's appeal are largely uncontradicted.

It is clear that as a result of the ongoing marital dispute and child custody battle, Mrs. Sesi became an informant for the government (Trans. 4-22-88, p. 18-19). It is also clear that Mrs. Sesi moved out of the marital residence on or about January 30, 1987 (Trans. 4-20-88, p. 31, L.19) and had no keys to the home (a residence rented by the defendant), and was not permitted to enter the residence (aside from going in the garage where her belongings were put) from that time on (Trans. 4-20-88, p. 52, L.22) by the respondent.

Despite this ongoing hostility, Mrs. Sesi, as a government agent (as the Trial Court recognized, Trans. 4-25-88, p.25, L.9), entered into the respondent's home and conducted a warrantless search of that home. Upon observing (not stumbling on, as this fact twisting prosecutor would like this court to believe) a closed duffle bag belonging to the respondent, she opened it, and found what she believed to be cocaine (Trans. 4-20-88, p. 56 and affidavit for search warrant par. (3)(B)(4)(5)).

The Court of Appeals, citing People v. Wagner, 114 McA 541 (1982), correctly held that the police cannot avoid the constitutional limitations imposed upon them by claiming that the acts of a private party are also involved, if that party is acting as a government agent. See also Alderman v. United States, 394 U.S. 165 (1968), Burdeau V. McDowell, 256 U.S. 465, (1921), Gould v. United States, 255 U.S. 298 (1920).

Such a finding is both in conformity with such a long line

of cases. Katz v. United States, 389 U.S. 347 (1967), Lewis v. United States, 385 U.S. 206 (1966), Lo-Ji Sales Inc. v. New York, 442 U.S. 319 (1978), United States v. United States District Court, 407 U.S. 297 (1971), United States v. White, 401 U.S. 745 (1970), and is so fundamental to American jurisprudence that one can only believe that this overzealous petitioner is attempting to wipe the Fourth Amendment off the books in the guise of a government agent conducting a search; then giving consent to his/her fellow agents to conduct a search.

Petitioner attempts to find error by indicating that the respondent had no "expectation of privacy" from a search conducted by his separated wife acting as a police agent. Is it the government's contention that the police should now recruit the separated spouses of suspects or plant a spouse in those homes they wish to conduct warrantless or otherwise illegal searches in order to insulate themselves from Fourth Amendment requirements?

Such a scenario, as advocated by this overzealous fact twisting petitioner, is abhorrent to anyone on an emotional level. Fortunately, it is also illegal. U.S. v. Clarke, 451, F2d 584 (1971) held that where a defendant's son-in-law (who was a deputy sheriff) was requested to enter the home of the defendant for the purpose of obtaining stock certificates owned by the defendant's father, and who, while he was within the home, undertook a side venture of looking behind a mirror for stolen bonds, was acting in his capacity as a law enforcement officer, rather than exclusively as a son-in-law on a family mission, and absent a search warrant, the search was in violation of the Fourth Amendment and the evidence should have been suppressed.

In Lewis, the Supreme Court recognized the value of undercover police activity for effective law enforcement. There an undercover agent was invited and admitted by defendant into his home for the purpose of negotiating a felonious sale of narcotics. The Supreme Court of the United States held:

"Without question, the home is accorded the full range

> of Fourth Amendment protections (citations omitted). But when, as here, the home is converted into a commercial center to which outsiders are invited for purpose of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purpose contemplated by the occupant. Id. at 211, 87 S. Ct. at 427."

Here agent Susan Sesi was not invited onto the premises nor was she conducting business with the respondent for a felonious sale of contraband. And last, but not least, she wasn't on the premises to put away "pots and pans" as this petitioner would like this court to believe.

Even in third party consent cases (where the consenter is a private individual and not a police agent, as was Mrs. Sesi) the validity of the consent to a warrantless search does not rest on some esoteric law of property.

The leading case in that area is U.S. v. Matlock, 415 U.S. 164 (1974). In that case the U.S. Supreme Court enunciated a standard for valid warrantless searches by consent of a third party. The Court held that for such a search to be valid, the permission must be obtained from a third party who possessed "common authority" or other sufficient relationship to the premises or effects sought to be inspected, pg. 171.

> In a footnote, the Court defined "common authority" as: "....not to be implied from the mere property interest a third party had in the property. The authority which justifies the third party consent does not rest upon the law of property...but rests rather on mutual (emphasis added) use of the property by the person generally having joint access or control for most purposes, so that it is reasonable to recognize that

> any of the cohabitants (emphasis added) has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched, pg. 171."

In the case at bar, Susan Sesi had not been a cchabitant for a least six weeks and had found alternate permanent housing. She did not have keys (nor, in effect, joint access), to Mr. Sesi's home and conversely, he didn't have access to her home. Nor can it be said that she in any way had mutual use of the property or control of that property for most purposes. Furthermore, the conduct of Mr. Sesi (i.e., changing the locks, making all rental payments and refusing his consent to allowing Mrs. Sesi entry)[1] clearly demonstrates he was in no way assuming the risk that Mrs. Sesi had authority to permit or conduct a search as a police agent.

The United States Supreme Court in Frazier v. Cupp, 394 U.S. 731; addresses a consent by a relative to search a duffle bag that was being used jointly by petitioner and his cousin, Rawls, and the duffle bag had been left at the cousin's house. The Court stated:

> "Since Rawls was a joint user of the bag, he clearly had authority to consent to its search...Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside."

This court should note that the search extended beyond a mere premises search, but extended to Mr. Sesi's closed duffle bag that was owned and used exclusively by him. The courts have

---

[1]Compare the issue of consent in this case with U.S. of America ex rel. William Cabey v. Joseph Mazurkiewicz 431 F.2d 839, 843 (1970). Addressing the issue of consent by a hostile spouse.

long recognized that even if a person may have the necessary common authority over a given premises, to give a valid consent to search of that area, such authority to consent is not thereby extended to a search of another's exclusive property found on those premises.

For example, in U.S. v. Dien, 609 F2d 188 (1979) the Court held that just because a co-worker or co-tenant had equal access over a given area, he could not therefore give a valid consent to search sealed cardboard boxes used exclusively by the other. The court, therefore, suppressed the contraband found in those boxes.

In the case at bar, the prosecution failed to demonstrate in any way, shape or form that the closed duffle bag search by Mrs. Sesi, acting as a government agent, was anything other than the sole, exclusive property of Mr. Sesi and/or used by him.

If, as indicated by the previous cases, a private party acting in his or her individual capacity doesn't even have the authority to consent to a search absent meeting the criteria set forth by Matlock, one can only wonder why the petitioner believes that the government using Mrs. Sesi as a police agent, under the facts of this case, can sidestep the Fourth Amendment or consent to the search of the duffle bag that Mrs. Sesi had no joint common authority over.

CONCLUSION

The effort of the State of Michigan to present this case as an appropriate case for review under Rule 17 must fail. Stripped of the argument based upon erroneous claims that the search was "consented to" by a government agent is irrelevant, this is a peculiar case based upon unique facts not likely to arise again and decided by the application of well-settled principles of federal constitutional law. It is not worthy of consideration of this Court under Rule 17.

Thair Hanna Sesi, per se
33278 Linsdale Court
Sterling Heights, Michigan 48310
(313) 939-7432

AFFIDAVIT OF SERVICE

To the best of my knowledge, this Brief in Opposition to the Petition for Writ of Certiorari has been placed in the United States Mail at 4;00 p.m. on the 4th day of December, 1989 correctly addressed to the Clerk of the United States Supreme Court and postage prepaid.

Thair Hanna Sesi

Sworn to and subscribed before me this _____ day of November 1989.

Notary Public, State at Large

CERTIFICATE OF SERVICE

I, Thair H. Sesi, do hereby certify that prior to filing the foregoing or immediately thereafter, I caused to be delivered, by personal service a true and correct copy of same, on Paul Ficsher, counsel of record for the Petitioning Party.

Done this the 6th day of December, 1989.

RESPONDENT